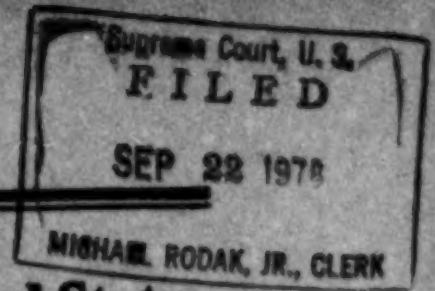


No. 77-1576



Supreme Court of the United States

OCTOBER TERM, 1978

JOHN VAL BROWNING,
Petitioner,

v.

UNITED STATES OF AMERICA

**PETITIONER'S REPLY TO BRIEF FOR THE
UNITED STATES IN OPPOSITION**

Edward P. Morgan
Kevin T. Maroney
WELCH & MORGAN
300 Farragut Building
900 - 17th Street, N.W.
Washington, D.C. 20006
(202) 296-5151

IN THE
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The Brief in Opposition of the United States deserves a few brief comments by the petitioner.

1. In describing the indictment, the respondent asserts that the indictment alleged that "petitioner persuaded both FN and Miroku to falsify" invoice prices in Customs declarations. But the indictment does not use the word "persuaded." It does allege an endeavor to obstruct the administration of the laws by "counseling, advising and suggesting." (Pet. App. 34a). But it does not charge "persuaded."

2. In discussing petitioner's argument relating to accomplices at pp. 10-12 of the Brief in Opposition, the respondent asserts that the case is different from *United States v. Cameron*, 460 F.2d 1394 (C.A. 5), because here "FN and Miroku were not named as accomplices in the indictment, and therefore the charges against petitioner could not have involved any of the logical problems discerned by the *Cameron* court." (Br. in Opp., p. 12).

To the contrary, this indictment alleges that both FN and Miroku, when they raised certain gun prices above \$25.00, would bill separately for such increases while still declaring the unit price and value on the Special Customs Invoice to be below \$25.00, "well knowing that the unit price and value . . . exceeded that amount." (Count I, paras. 3 and 10 and Count II, paras. 3 and 5.) It is abundantly clear from the indictment that the alleged obstruction of justice in Counts I and II assertedly lies in communications between Browning and officials of Fabrique Nationale (Count I) and Miroku (Count II), all of whom are alleged by intendment and legal effect to be accomplices in communicating false or misleading information to Customs.

3. In our petition for certiorari, we argued that although two courts of appeals, in *United States v. Fruchtman* (C.A. 6), 421 F.2d 1019, and *United States v. Rice* (C.A. 8), 356 F.2d 709, had used broad language holding that 18 U.S.C. 1505 applied to both the investigative and adjudicative function of a department or agency, the facts in those cases showed there was present in each the formality which would initiate a "proceeding." (Pet., p. 13).

The Brief in Opposition agrees with this observation as to *Rice*, but argues that the "court of appeals opinion in *Frucht-*

man, however, makes no mention of the filing of a complaint and refers only to an informal investigation by the Commission." (Br. in Opp., page 7, fn. 2).

It is true that the court of appeals opinion makes no mention of the fact, but the government's brief in that case (No. 19348) states the following:

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"The Court below found the following characteristics of Smeraldi's investigation to be relevant to its holding that it was a 'proceeding' protected by the criminal sanctions of 18 U.S.C. §1505:

'In accordance with the Rules of Practice, the Federal Trade Commission 16 C.F.R. Supp. Sec. 1.1 *et seq.*, the *McLouth* investigation of alleged discriminatory pricing practices of cold rolled steel was initiated upon the filing of an undisclosed complaint.'

Page 23:

"The only relevance this section [18 U.S.C.A. §1510] would have to agency proceedings would be if the obstruction occurred by means of intimidating a *complaining witness* before he had made his complaint to the agency in a criminal matter. Once the complaint has been made, the obstruction is then of an agency proceeding and §1505 has been construed to apply." (bracketed materials added)

Therefore, according to the government's own brief in the court of appeals in *Fruchtman*, a complaint had been filed in the matter, initiating a "proceeding."

In this case there was, of course, no element of any formality initiating a "proceeding." There was simply an investigation which, we submit, is not embraced within the ambit of 18 U.S.C. 1505.

Respectfully submitted,

Edward P. Morgan

Kevin T. Maroney

WELCH & MORGAN

300 Farragut Building

900 Seventeenth Street, N. W.

Washington, D. C. 20006

(202) 296-5151